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Supreme Court of the United States

OCTOBER TERM, 1940

No. 23

WILSON & CO., INC., a Corporation, *Petitioner,*

v.

UNITED STATES OF AMERICA

No. 24

WILSON & CO., INC., OF KANSAS, a Corporation, *Petitioner,*

v.

UNITED STATES OF AMERICA

No. 25

T. M. SINCLAIR & COMPANY, LIMITED, a Corporation, *Petitioner,*

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR PETITIONERS

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OPINION BELOW

The opinion of the Court of Claims covering all three cases (R. 11-14) is reported at 30 F. Supp. 672.

JURISDICTION

The judgments and orders of the Court of Claims were entered on December 4, 1939 (R. 15). The petition for certiorari was filed on March 1, 1940, and was granted on April 22, 1940 (R. 19). The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Whether petitioner is entitled to recover in this action amounts to which it was entitled as export drawbacks under the Agricultural Adjustment Act, as amended.

STATUTES INVOLVED

The pertinent provisions of the Agricultural Adjustment Act and of the amendments thereto, and of the Revenue Act of 1936, are printed in the Appendix.

STATEMENT

This action was instituted by the filing of three petitions in the Court of Claims on March 31, 1939. The allegations of the petition in No. 23, filed by Wilson & Co., Inc., are, *mutatis mutandis,* identical with the petitions in the other cases. Reference will be made, therefore, only to the record in that case.

Petitioner is a corporation engaged in the packing and sale of meat products, including hog products, for foreign and domestic commerce. During the period of the processing taxes levied by the Agricultural Adjustment Act, as amended, from November, 1933, to January, 1936, it exported in its own name as consignor large quantities of its hog products to various foreign countries (R. 1). For several years petitioner received on these exports the drawbacks provided by Section 17(a) of that Act. The failure of the Commissioner of Internal Revenue to pay the export drawbacks due to petitioner on later exports has made this action necessary.

The basic position of Section 17(a) in the Agricultural Adjustment Act.—The export drawbacks provided by Section 17(a) were an integral part of the agricultural assistance program embraced in the Agricultural Adjustment Act. That Act was a comprehen-

sive emergency statute designed to remedy the depressed state of agriculture in the United States. Two basic methods were to be employed. The first was a combination of voluntary reductions in acreage and cash benefits to farmers. The second, with which the present case is more directly concerned, was a program of diverting agricultural surpluses from regular domestic markets and promoting exports of American agricultural commodities. The absolute necessity, in connection with this second method, of preserving our foreign markets—indeed, of increasing them—was recognized from the outset.[1]

To pay the cost of this Act, Congress levied a tax on the first domestic processing of a number of basic agricultural products, including hogs. The tax was a heavy one, but extreme care was taken to protect the existing markets—both domestic and export—for the products which it was the basic purpose of the Act to foster.

[1] The condition of the export trade in agricultural products had been emphasized in the Congressional hearings on the Act. See *Hearings before the House Committee on Agriculture*, 72d Cong., 2d Sess., pp. 142-145. See also *Economic Bases for the Agricultural Adjustment Act* (U. S. Dept. of Agriculture, 1933), pp. 14-19, 34. The original Act of May 12, 1933, contained (in addition to the vitally important Section 17) a provision authorizing the Secretary of Agriculture to expend the proceeds of the processing taxes for, *inter alia*, "expansion of markets". Section 12 (b), 48 Stat. 31. In the comprehensive amendments of 1935, this limited provision was removed from Section 12(b), and an appropriation made of 30 per cent of the gross receipts from customs duties to be spent, *inter alia*, "to . . . encourage the exportation of agricultural commodities and products thereof by the payment of benefits in connection with the exportation thereof or of indemnities for losses incurred in connection with such exportation . . . ." Section 32, Act of August 24, 1935, 49 Stat. 750, 774.

Domestically, prejudicial competition between taxed and untaxed commodities was avoided by compensating taxes on competitive products which bore no processing tax burden. Thus, products processed before the processing tax became effective were automatically subjected to a floor stocks tax in an amount equivalent to the processing tax. Section 16(a)(1).[2] Further, a compensating tax was imposed upon imports of goods already processed from taxable commodities. Section 15(e). To prevent shifts in consumption from taxed products to substitute products made from untaxed commodities, *e. g.*, cotton vs. paper or jute, a compensating tax was also levied upon the first domestic processing of such competing commodities wherever the Secretary of Agriculture found that such shifts might occur. Section 15(d). Or if this could not be done and a shift in the domestic consumption of a particular taxed product might follow, the Secretary could certify this result, and the tax would be refunded. Sec. 15(a).

With respect to the export market, there would obviously have been a drastic dislocation of foreign markets if products made from taxed commodities and exported from the United States had been forced to compete with untaxed foreign goods. This was avoided by the system of export drawbacks which form the basis of the present action. By Section 17 of the Act, *infra*, p. 40, Congress insured that goods sold abroad would

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[2] Conversely, if a processing tax were wholly terminated, automatic refunds on taxed floor stocks were provided. Section 16 (a)(2). If, during the life of the Act, the rate of the processing tax was changed (as was true of the processing tax on hogs, for example), compensating changes were made in floor stocks taxes by additional levies or refunds. Section 16(e).

be relieved of the additional burden of the domestic processing tax.[3]

In general, Section 17 provided two methods by which a processor might eliminate the tax from the prices at which he sold abroad. By subsection (a) Congress agreed that the tax which had been paid on the processing of a commodity would be repaid upon proof of export to the exporter consignor or his nominee.[4] Or, by subsection (b), Congress provided that the processing of goods destined for export might be done under bond, no tax being paid at all, and liability under the bond discharged upon proof of export.[5] The difference was solely a matter of mechanics,[6] and each method insured

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[3] The purpose of Section 17 is made clear in the report of the House Committee on Agriculture (H. Rep. No. 6, 73d Cong., 1st Sess.) which stated (p. 6):

> In addition, provision is made for refund of processing taxes with respect to exports, thereby continuing the present competitive situation of our products in foreign markets.

See also *Hearings before the Senate Committee on Agriculture and Forestry*, 73d Cong., 1st Sess., p. 65.

[4] See also Internal Revenue Regulations 83, Articles 2-13. The sub-section was modeled on the familiar drawback provisions of the tariff law. Tariff Act of 1930, Section 313 (46 Stat. 693; U. S. C., Title 19, Sec. 1313). The regulations under that Act had long recognized the exporter consignor as the one primarily entitled to drawback payments. See Customs Regulations, 1931, Art. 1049; Customs Regulations, 1937, Art. 1038-41, 1070.

[5] See Regulations 83, Articles 14-30. These provisions were intended to be parallel to those of the tariff law (Tariff Act of 1930, Sec. 553; 46 Stat. 742, U. S. C., Title 19, Sec. 1553) which permit goods to be bonded in transit. See *Senate Hearings, supra*, p. 65.

[6] Subsection (b), of course, could be taken advantage of to the full extent only by a processor who knew at the time of processing that the resultant products from a specific quantity of the taxed

that exported goods could be sold ex-tax in competition with foreign goods in foreign markets.

The operation of Section 17.—It is undeniable that processors who sold abroad relied completely upon the promise of the Government to pay export drawbacks under Section 17(a). It was a commonplace that American agricultural products—hog products such as bacon and lard as well as cotton and tobacco and wheat —were competing in the world markets with like products from other countries where no processing taxes were levied, and where often export subsidies were paid. The Government economists realized that the imposition of a processing tax would raise the domestic price level relative to the world price level of any commodity by approximately the amount of the tax on that commodity.[7] Indeed, Section 17 was a Congressional recognition of the fact that the domestic price would be higher than the world price by *at least* the amount of the tax.

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commodity were to be exported. Processing establishments such as those of petitioners, which necessarily carried large stocks of green, secondary, and cured, smoked, or refined products, such as lard, bacon, cured ham, etc., generally found it far more convenient to attempt no preliminary segregation of unprocessed hogs, but rather to pay a tax on all processing and receive the export drawback on the products ultimately exported.

[7] See, *e.g.*, *Economic Bases for the Agricultural Adjustment Act* (U. S. Dept. of Agriculture, 1933) p. 60; *Economic Situation of Hog Producers* (U. S. Dept. of Agriculture, Bureau of Agricultural Economics, 1933) in Sen. Doc. No. 184, 72d Cong., 2d Sess., p. 60. Since insurance charges and in many cases foreign tariffs were based on American export prices, the tendency would have been for the spread to exceed the amount of the tax.

Unquestionably, such was the consequence.[8] Any sale abroad, therefore, was made at the sacrifice of a sale in the domestic market where the price was higher by the amount of the tax.[9] That sacrifice was warranted by the promise that the differential would be made up by the export drawback; but the important fact is that every exporter was making that sacrifice and was making it upon the promise contained in Section 17(a).[10]

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[8] See, *e.g.*, *An Analysis of the Effects of the Processing Taxes Levied Under the Agricultural Adjustment Act* (U. S. Treasury Dept., 1937) pp. 3, 9, 27.

[9] Particularly was this true of hog products, the commodity upon which the export drawbacks here are sought. For several years after 1933 the pronounced domestic shortage guaranteed a ready domestic market for all of the relatively small proportion of such products which were exported. See, *e.g.*, *Livestock Under the AAA* (Brookings Institution, 1935) p. 242.

[10] No question of "passing on" or "bearing the burden" of the tax is involved. Whether petitioner did or did not is wholly beside the point. What is material is that petitioner sacrificed a higher *price* on the promise that the differential between that higher domestic price and the lower export price would be made up by the export drawback.

The actual sacrifice in dollars and cents may be seen from the domestic (Chicago) and world (Liverpool) prices of lard given in *Agricultural Statistics, 1937* (U. S. Dept. of Agriculture) p. 266, Tables 363, 364. For the year preceding the processing tax (November, 1932-October, 1933) the average price per hundredweight of lard in the world market was $1.03 *higher* than the domestic price. For the year during which the processing tax was at the $2.25 rate (March, 1934-February, 1935) the world price was *lower* than the domestic price by an average of $1.38. The net change was $2.41, which is almost exactly the amount of the tax when the conversion factor for lard (110) is applied. Since the $1.03 differential may be considered the normal margin necessary to enable an American exporter to pay costs of transportation and the like, it is apparent that every sale of lard abroad after the tax

Thus Section 17, both in theory and in practice, was a vital part of the whole Agricultural Adjustment program. The export drawbacks which it granted (or the complete exemption from tax granted by the bonding provision) was not solely a matter of fair dealing with taxpayers who would have to sell in competition with untaxed products. Nor was it an incidental Congressional gratuity. Section 17 was an integral part of the plan to reduce surplus stocks of agricultural commodities and it could and did operate only because exporters were assured that they would be compensated for the sacrifice which they made in not selling in the higher domestic market.

Congressional attitude toward Section 17.—The importance of Section 17, as well as the Congressional attitude toward it, is well illustrated by the events of 1935. During the spring of that year, injunctions against the collection of processing taxes had been increasing in number. By summer, they were in full flood—so much so that Congress felt it necessary to take some measures to prevent the total cessation of tax collections. On August 24, 1935, in the comprehensive Agricultural Adjustment Act amendments (49 Stat. 750) Section 21 was added. By Section 21(a) injunctions against the processing taxes were removed from the jurisdiction of the federal courts, and by Section 21(d), *infra,* p. 41, the principle was first laid down that no refund of processing taxes should be granted unless the claimant established that he had

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was imposed was made at a sacrifice of about $2.40, which had to be made up by the export drawback. This $2.40 represented almost one quarter of the average domestic price of the lard. Obviously, few exports would have been made had the promise of the drawback not been given.

borne the burden of the tax. That principle was continued in the Revenue Act of 1936.

Two facts are significant. The first is that the same law which added Section 21 also amended Section 17 to clarify and implement its provisions. Section 28, 49 Stat. 750, 770.[11] The second, and more important, is that Congress, recognizing that export drawbacks were normal and necessary parts of the taxing scheme, specifically exempted in Section 21(d)(1) claimants under Section 17(a) from the obligation to establish that the tax was not passed on. The export drawbacks under Section 17(a) and the processing in bond for export purposes were continued throughout the period of the Agricultural Adjustment Act.

When Section 21(d) was enacted, in 1935, this Court had not yet handed down its decision in *United States* v. *Butler*, 297 U. S. 1. After that decision it became apparent that a more comprehensive statute was necessary to deal with the question of unconstitutionally exacted processing taxes. That need was met in the Revenue Act of 1936. The relevant provisions of that Act are discussed at length at pp. 16-29, *infra;*

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[11] Until the amendments of Section 17 by Section 28 of the 1935 amendatory act, export drawbacks were payable only on products processed "wholly or in chief value" from a taxed product. Section 28 changed the language to "wholly or partly". Until the 1935 amendments, no drawbacks were allowed unless proof was given that the tax had been paid, and refunds only could be made. Section 28 eliminated the necessity of proof of payment, and allowed a credit of taxes which were payable. In addition, Section 28 clarified the statutory language with respect to the person to whom the drawback was to be paid by providing that payment of the export drawback should be made to the exporter, unless he waived payment, in which event it was to be paid to the processor of the products.

here it is enough to note that Title VII contained an amplified and, to some extent, clarified version of Section 21(d), and continued its basic philosophy that refunds of processing taxes illegally collected would be made only if the claimant could demonstrate that he bore the burden of the tax. The mechanics by which that proof was to be made were spelled out at length. In addition, by Title IV, certain sections of the old Agricultural Adjustment Act were reenacted, including Section 17(a).

The export drawbacks which petitioner claims are, it must be remembered, due to petitioner irrespective of the validity of the Agricultural Adjustment Act. No claim is made based upon the decision in the *Butler* case. The export drawbacks are thus wholly different from the claims for processing taxes illegally collected due to the invalidity of the Act—the claims which it was the purpose of Congress to deal with in 1935 in Section 21(d) and in 1936 in Title VII of the Revenue Act. Petitioner claims only the amounts which were assured it by Section 17(a) of the Act, now reenacted (if that were necessary following the *Butler* case) by Section 601(a) of the Revenue Act of 1936.

Having in fact during 1934 and 1935 exported and sold certain hog products abroad—necessarily at the world price which reflected the drawbacks promised in Section 17(a)—petitioner filed, in due course, its claims for refund for the amount of the export drawbacks. For some time its claims were paid, but beginning in August, 1935, no further payments were made. The claims here involved were filed with the Collector of Internal Revenue for the First District of Illinois, pursuant to and in compliance with the regulations prescribed by the Commissioner of Internal Revenue (R.

1-2).[12] Each of the claims was rejected (R. 2), and this suit was begun in the Court of Claims.

The Government, on September 5, 1939, moved to dismiss the petition on the ground that petitioner could recover only by meeting the requirements prescribed by Title VII of the Revenue Act of 1936 (R. 10). On December 4, 1939, the court below rejected that argument, as every other court had done, and held that petitioner was entitled to its drawback payments (R. 11-14). It concluded, however, that it was powerless to grant relief, and that the petition must be dismissed because the court was without jurisdiction under Section 601(e) of the 1936 Act, *infra*, p. 43. This decision was rendered notwithstanding the point had been specifically disclaimed by the Government's brief. The Government being still unwilling to pay to petitioner the drawbacks to which it was held entitled under every court decision, the petition for certiorari was filed and the writ granted on April 22, 1940 (R. 19).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that Section 601(e) of the Revenue Act of 1936 deprived it of jurisdiction to entertain these actions.

2. In not holding that petitioners were entitled to recover the amounts set out in their claims for refund.

3. In dismissing the petitions.

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[12] The details of the claims are set out in Exhibit A to each of the petitions, which, by stipulation (R. 15-18), have not been printed in the record in this Court. They are contained, however, in the certified record on file with the Clerk.

SUMMARY OF ARGUMENT

I

Petitioners seek to recover export drawbacks assured to them by Section 17(a) of the Agricultural Adjustment Act, reenacted in Title IV, Section 601(a) of the Revenue Act of 1936. Their claim is resisted by the Government on the ground that Section 601(b) of the Revenue Act of 1936 forbids the payment of export drawbacks to exporters who were also taxpayers and that petitioners' sole remedy is under Title VII of that Act.

Both Title IV and Title VII deny the Government's contention. Section 601(a) of Title IV expressly commands the payment of export drawbacks in accordance with Section 17(a). Section 911 of Title VII makes that Title inapplicable to refunds under Section 17(a). Moreover, construed as the Government would construe it, Section 601(b) attributes to Congress an intention to avoid its promise contained in Section 17(a), to penalize petitioners because they relied on that promise, to change its position completely from that which it had adopted the year before in enacting Section 21(d) of the Agricultural Adjustment Act, and to withdraw what it had expressly granted in subsection (a) of the same Section 601.

Every court, including the court below, thus far has rejected the Government's contention. Section 601(b) has been construed as simply a correlative to Section 911; the former making relief under Title IV inapplicable to taxpayers seeking recovery of taxes upon the ground of illegality, and the latter making relief under Title VII inapplicable to claims for drawbacks and the like.

The construction which has heretofore been adopted by the courts avoids the inequity and inconsistency of

that urged by the Government. In addition, it is supported by the legislative history of the bill and by the fundamental inapplicability of Title VII to claims for export drawbacks. Finally, the Government's construction creates serious constitutional doubts as to the validity of Section 601(b) which can and should be avoided.

II

Although the court below decided that petitioners were entitled to recover, it also decided that Section 601(e) denied it jurisdiction to grant a refund. That point had not been urged in the court below, and consequently petitioners had had no opportunity to demonstrate the inapplicability of that section.

The general jurisdiction of the Court of Claims is not in question. And, properly construed, Section 601(e) does not limit that general jurisdiction, with respect to claims of this nature, to determine whether the Revenue Act, properly construed, places claims of this character under Title IV or Title VII. It does, on the other hand, make final the determinations of the Commissioner on such matters as findings of fact, computations and the like.

Thus construed, Section 601(e) has a wide field of operation, since the computation of refunds under those sections reenacted in Section 601(a) may involve many complicated and controversial questions. Thus construed, however, Section 601(e) does not forbid the Court of Claims to determine whether a claim for refund of export drawbacks can be considered under Title IV or must be considered under Title VII.

This construction of Section 601(e) is supported by the language of the section; by its striking dissimilarity to other sections in the same statute denying any juris-

diction whatever to the courts; by numerous decisions construing similar provisions in other statutes; by the well-settled canon of construction against nullifying existing rights through the device of removing their enforcement from the courts; and, finally, by the fundamental inconsistency of such a denial of judicial relief with the whole scheme of the Revenue Act of 1936 with respect to claims arising out of the Agricultural Adjustment Act.

ARGUMENT

I

PETITIONER IS ENTITLED TO THE EXPORT DRAWBACKS UNDER SECTION 17 (a), AND IS NOT REQUIRED TO PROVE ITS CLAIM UNDER TITLE VII OF THE REVENUE ACT OF 1936

The present case may be very easily summarized: Congress, as an integral part of a general plan to assist agriculture, set up in Section 17 of the Agricultural Adjustment Act a system of export drawbacks (and processing under bond) with the purpose of allowing processed goods to be sold in foreign markets tax-free. That system of export drawbacks persisted throughout the life of the Act. In reliance on it, petitioners made sales at the lower world price instead of at the higher domestic price. In 1935, when Congress felt it necessary to limit the right to refund of processing taxes, it specifically recognized in Section 21 (d) the inapplicability of such limitations upon refunds to the export drawbacks under Section 17. Indeed, the continued operation of Section 17 was specifically recognized by the 1935 amendment and its field of operation enlarged in that Act. The sole question here is whether the Revenue Act of 1936, passed less than a year later, should be construed as a complete *volte face* by Congress, so

as to impose upon claims for export drawbacks the same requirements which Section 21 (d) had imposed in 1935, and which Title VII of the 1936 Act now imposes, upon claimants seeking recovery of processing taxes solely upon the ground of *illegal* collection under *United States* v. *Butler*, 297 U. S. 1.

Petitioners' claim is unaffected by the legality or illegality of the Agricultural Adjustment Act. In fact, had no questions ever been raised as to the legality of the Act, the Government would have undoubtedly continued to return to petitioners the export drawbacks for which they are now forced to resort to court action. Moreover, had petitioners chosen to follow the practice of processing under bond pursuant to Section 17 (b), they would never have paid any taxes whatever on the exported products here involved. From this point of view, the question in this case is whether the Revenue Act of 1936 should be construed to *penalize* petitioners because the Agricultural Adjustment Act was held *unconstitutional*, and to *penalize* petitioners because for various business reasons (wholly divorced from Government fiscal policy) they chose to pay the processing tax upon a Congressional assurance that it would be returned to them upon the export of the processed products instead of executing, without payment of taxes, a bond which would have been automatically discharged by the proof of export. See Internal Revenue Regulations 83, Article 15. We submit the statute clearly indicates that no such *volte face* or penalty was intended. This has been the *unanimous* holding of the lower courts, including the court below (R. 14); *Cudahy Bros. Co.* v. *La Budde*, 92 F. (2d) 937 (C. C. A. 7th, 1937), *certiorari denied*, 303 U. S. 659; *Neuss, Hesslein & Co., Inc.*, v. *United States*, 30 F. Supp. 595 (S. D. N. Y., 1939).

Petitioners' claims, as the petition indicates, are based upon Section 17 (a) of the Agricultural Adjustment Act under which petitioners admittedly became entitled to export drawbacks in the amount of the processing taxes previously paid when they exported the processed products. In *Campbell* v. *United States*, 107 U. S. 407, 411, this Court characterized a statute similar to Section 17 (a) as creating—

> . . . a contract that when exported the government would refund, repay, pay back, this amount as a drawback. . . .

We turn, then, to the 1936 Revenue Act to see whether this contractual and moral obligation upon the faith of which petitioners have acted has been ignored.

One would expect the answer to be given in Title IV of that Act, which is entitled "Export, Charitable, etc., Refunds and Floor Stocks Adjustment under Agricultural Adjustment Act". That expectation is realized in Section 601 (a), which states, in words which admit of no doubt, that Congress recognized the obligation and that it is to be discharged:

> (a) The provisions of sections 10(d), 15(a), 15(c), 16(e)(1), 16(e)(3), and 17(a) of the Agricultural Adjustment Act, as amended, are hereby reenacted but only *for the purpose of allowing refunds in accordance therewith in cases where* the delivery for charitable distribution or use, or *the exportation,* or the manufacture of large cotton bags, or the decrease in the rate of the processing tax (or its equivalent under section 16(e)(3)), *took place prior to January 6, 1936.* (Italics supplied.)[13]

The purpose of the section is abundantly clear. The decision in the *Butler* case had left the validity of the

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[13] Petitioners' claims are limited to goods exported prior to January 6, 1936 (R. 1).

whole Agricultural Adjustment Act under a cloud. The Commissioner of Internal Revenue was doubtful whether even Section 17 (a) remained in effect to give him statutory authority to pay the export drawbacks. Congress resolved that doubt by reenacting Section 17 (a) and instructing him to make the payments contemplated by that section "*in accordance therewith.*" Both the House and Senate reports on the Act state in similar language (H. Rep. No. 2475, 74th Cong., 2d Sess., p. 13; Sen. Rep. No. 2156, 74th Cong., 2d Sess., p. 27):

> . . . The enactment of this section will serve to remove doubts as to the legal authority of the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, which have existed since the decision of the United States Supreme Court holding the Agricultural Adjustment Act invalid, to continue the making of refunds under the provisions of sections 10(d), 15(a), 15(c), 16(e)(1), 16(e)(3), and 17(a) of that Act, as amended.

The intention of Congress to fulfill its contractual obligations under Section 17 (a) is equally clear if we look not at Title IV, but at Title VII. In the court below and in other courts the Government has contended, albeit always unsuccessfully, that petitioners or those in like position must prove under Title VII that they had not passed on the burden of the tax. The promise of Congress is ignored. The reliance upon that promise, not only in selling abroad at the sacrifice of a higher domestic price but also in paying the tax instead of executing a bond, is ignored. The position of Congress a year before in Section 21 (d) in specifically exempting export drawbacks from the requirements of a suit for refund based on illegality, is ignored. The Gov-

ernment contends simply that Congress disregarded its promise, closed its eyes to the inequitable results which would follow, abruptly changed its position of a year before, and imposed upon petitioners the fundamentally inapplicable requirements of Title VII.

Title VII carries its own denial of such an intention. Section 911 (part of Title VII) provides:

> The provisions of this title shall not apply to any refund authorized under the provisions of sections 15, 16, or 17 of the Agricultural Adjustment Act, as amended and reenacted, or with respect to any articles exported under the provisions of Section 317 of the Tariff Act of 1930. . . .

As plainly as words permit, Congress has reenacted in virtually identical language the provision contained in Section 21 (d), *infra,* p. 41, specifying that proof of the ultimate incidence of the tax is unnecessary where the claim is for export drawbacks. This language in the 1935 amendment, the Government will admit, required export drawbacks to be paid to petitioners without proof of bearing the burden of the tax.

Thus, both Title IV and Title VII contain a plain denial of the intention of Congress to avoid its promise, to penalize petitioners because they relied on that promise, and completely and inexplicably to change its mind. Nonetheless, the Government insists that Congress had such an intent. Its argument is based solely upon Section 601 (b). That section provides, in part, as follows:

> (b) Except for refunds under Section 15 (a) of the Agricultural Adjustment Act, as reenacted herein, no refund under this section shall be made to the processor or other person who paid or was liable for the tax with respect to the articles on which the claim is based. . . .

This sentence in subsection (b), the Government urged below, denies to petitioners the refund expressly granted them by subsection (a). We believe that the evidence is clear that Congress did not intend that to be the meaning of the sentence, particularly since that meaning raises very serious constitutional questions.

Before we proceed to an analysis of the Government's contention, we wish to be sure that this Court appreciates—as all the lower courts have—that the Government's construction of the statute results in not only a thoroughly inequitable result, but also in a logical absurdity. It requires a decision that Congress, in subsection (a) of Section 601, consistent with its original plan and with Section 21 (d) of the 1935 Act, provided for the fulfillment of its promise to pay export drawbacks, and then, in subsection (b) of the same section, enacted at the same time, revoked its act. As the Circuit Court of Appeals remarked in *Cudahy Bros. Co.* v. *La Budde,* 92 F. (2d) 937, (C. C. A. 7th, 1937), 938, *certiorari denied,* 303 U. S. 659:

> To our minds it could not have been the intent to provide specifically in subsection (a) for preservation of the remedy for drawback in case of exportation and then immediately following, by subsection (b), to provide that the remedy specifically recognized by subsection (a) was abolished.

The Government's argument has, in fact, always been readily answered by the interpretation which makes for consistency and equity rather than the one which makes for absurdity and inequity. In the *Cudahy* case, *supra,* for example, the court concluded that the sentence in subsection (b) had reference not to processor-exporters claiming export drawbacks, but rather to processors who claimed a refund solely upon the ground

of illegality of the tax—that is, that the sentence is simply intended to foreclose any attempt by a processor not entitled to a drawback to recover the amount of tax paid on goods subsequently exported on the ground that the tax was illegally levied under *United States* v. *Butler*. By the same token, it has no application to an exporter in the position of petitioners who claims export drawbacks as an exporter, and whose claim is in no degree dependent upon the illegality of the tax. The same construction of the sentence in subsection (b) was adopted in *Neuss, Hesslein & Co., Inc.* v. *United States*, 30 F. Supp. 595 (S. D. N. Y., 1939), and in the court below (R. 13).

Inequity and absurdity are thus avoided. The exporter (consignor) who had sold abroad in reliance on the promise contained in Section 17(a) was always to be paid the export drawback which Congress had assured—irrespective of whether such exporter (consignor) had or had not been the original taxpayer. On the other hand, as to taxes paid on products later exported, the original processor grounding his claims on the constitutional invalidity of the tax was to be in no better position than one who processed for the domestic market. The sentence in subsection (b) of Section 601 is simply the correlative in Title IV of Section 911 in Title VII. Each of them was inserted to make clear that claims based upon export and the like were to be paid under Title IV and that claims based upon illegal collection were to be subject to the requirements of Title VII. As the court below states (R. 13):

> The only purpose of the sentence was to make it plain that processors who are not exporters were not to have the benefit of that section, but were to be confined to the relief provided for processors as such.

This construction of the sentence is also indicated by the statement in the House Report (H. Rep. No. 2475, 74th Cong., 2d Sess.). In referring to Section 601 (b), which then consisted solely of the sentence in question,[14] the report states (p. 14) that these "processors" are excluded because—

> the claims of such persons are within the provisions of Section 21 (d) of the Agricultural Adjustment Act, as amended.

As we have pointed out above, Section 21 (d) applied only to claims for *refund* based upon *illegal* collections, and specifically did *not* apply to export drawbacks. The "processors" in Section 601 (b), therefore, were not intended to include claimants for export drawbacks, because the language of Section 601 (b) was intended to have the same scope as Section 21 (d) to which the processors were remitted.

Nor does the Senate Report indicate a purpose to change the scope of Section 601 (b) (Sen. Rep. No. 2156, 74th Cong., 2d Sess.). Title VII was added to the bill, and Section 601 (b) was expanded to include other matters. The sentence in question was retained, however, with the comment (p. 28) that the claims of such "processors" were included in Title VII. Since Title VII was but a clarifying and elaborating substitute for Section 21 (d) (see Sen. Rep., *supra*, pp. 32-34), the Senate comment indicates, as the House comment plainly states, that "processors" in subsection (b) of Section 601 meant those who were originally remitted to Section 21 (d) and now are remitted to Title VII—

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[14] The proviso in the sentence relating to Section 15(a) was added by the Senate. Otherwise the House Report is directed to a provision identical with that which ultimately became law.

those who sought refunds of processing taxes on the grounds of *illegality*. The indication in the Senate report becomes a certainty when it is recalled that Section 911 of Title VII, in practically the language of Section 21 (d), states that it shall not apply to the payment of export drawbacks.[15]

A further and important factor which should be considered in appraising the Government's construction of Section 601 (b) as remitting petitioners to Title VII, is the fundamental inapplicability of that Title to export drawback claims. Title VII sets up a procedure, and certain presumptions, for determining the ultimate incidence of the processing tax. Recovery is granted only to the extent that the claimant "bore the burden" of the tax. Section 902. But, as we have pointed out above, p. 7, the question involved here is not a question of who "bore the burden". Unquestionably, petitioners "bore the burden", but in a different sense: petitioners sold abroad at a price lower than the domestic market price by almost exactly the amount of the tax (see p. 7, *supra*). They did so upon the assurance that Congress would make up the difference by a

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[15] There is an ambiguous sentence in the Senate report which is frequently cited by the Government. Referring to Section 911, which states categorically that Title VII does not apply to export drawbacks, the report states (p. 37) that the Section does not deny to processors who have exported goods the benefits of Title VII "since such processors are, with one minor exception, not entitled to the benefits of Section 601 of Title IV." Certainly this sentence in the report cannot have the effect attributed to it by the Government—to make claimants for export drawbacks subject to Title VII—since that gives Section 911 a meaning exactly opposite from what it says in so many words. The sentence in the report referring to "such processors" undoubtedly refers to processors seeking refunds of taxes on the ground of *illegality*.

drawback.[16] Indeed, Congress *wanted* petitioner to do just that. But Title VII takes into account no such manner of "bearing the burden" of the tax. The Title does not address itself to the possibility that the tax can be "borne" by selling in a foreign market at a price which does not reflect the tax. Neither Section 902, which lays down the conditions for refund, nor Section 907, which deals with the problem of evidence and proof, adverts to such a situation. The Title simply was not designed to deal with claims for export drawbacks which do not depend on the invalidity of the tax. The Title *is* designed to rationalize the *refunds* of taxes claimed solely on account of *illegality* of collection. Indeed, the reference to refunds pursuant to "court decisions" in Section 902 carries that clear implication. See *Cudahy Bros. Co.* v. *La Budde, supra,* 92 F. (2d) at p. 939.

We believe, therefore, that for these various reasons the sentence in Section 601 (b) cannot have the effect ascribed to it by the Government—of remitting exporters who happen to be also taxpayers to Title VII. But if a further basis for rejecting the Government's argument be necessary, a final and conclusive answer is that it raises a very serious question as to the constitutionality of the sentence in Section 601 (b). If any other reasonable construction is possible—and the construction already adopted by three lower courts is certainly possible—that constitutional question should be avoided. *Wright* v. *Vinton Branch Bank,* 300 U. S. 440, 461; *Crowell* v. *Benson,* 285 U. S. 22, 62; *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 492; *Blodgett* v. *Holden,* 275 U. S. 142, 148.

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[16] Petitioner also sacrified the full amount of the tax by relying on the export drawback in Section 17(a) instead of processing under bond pursuant to Section 17(b).

The constitutional objection to the Government's argument is a fundamental one, and it can be stated very simply: Petitioners unquestionably acquired by the export of processed goods, contract rights against the United States for the return of such taxes as were paid with respect to those exported goods. *Campbell* v. *United States*, 107 U. S. 407, 411; *Durant* v. *United States*, 28 Ct. Cls. 356, 366-368 (1893). The United States had made an offer in Section 17 (a)—to refund processing taxes on such products as were exported. The offer was accepted—certain products were exported, reliance being placed on the offer to the extent that the higher domestic market price was not availed of by petitioners. The obligation to refund the taxes thereupon arose. Every aspect of a completed unilateral contract exists. *Restatement, Contracts*, Secs. 12, 29, 52. *Williston, Contracts* (Rev. ed. 1936) Ch. V.

This contract right against the United States is protected by the due process clause, and cannot be annulled by Congress except in the exercise of its police power or some other paramount power. The rule is stated in *Lynch* v. *United States*, 292 U. S. 571, which holds invalid an attempt by Congress to abrogate existing War Risk Insurance contracts, and to relieve the United States from a contractual liability which it had incurred. This Court, in a unanimous opinion, stated (p. 579):

> As Congress had the power to authorize the Bureau of War Risk Insurance to issue them [contracts of war risk insurance], the due process clause prohibits the United States from annulling them, unless,

> indeed, the action taken falls within the federal police power or some other paramount power.

Many previous cases are cited to the same effect.

The only question, then, is whether, under the rule laid down in the *Lynch* case, the Government's interpretation of Section 601 (b), which would result in remitting petitioners to Title VII, would annul their contract rights. A brief analysis of the nature of the rights of petitioners, and of the scope of Title VII, shows that such an annulment would be the inevitable consequence of the Government's argument.

Petitioners, here, have *two* rights. By the fact of *payment* of the illegal processing taxes, petitioners acquired rights to recover the portion of those amounts which they had paid representing the extent to which they in fact "bore the burden" of the tax. *In addition* to that right, by the fact of *export,* petitioners acquired under Section 17 (a) rights based upon a contract with the United States.

This latter right—the contract right—is independent of the right based upon illegality of the tax. The rights came into existence at different times—the right to refund because of illegality arose at the time the tax was paid, and the contract right arose at the time of export, a later time, and perhaps a much later time. The two rights have a wholly different foundation—one rests upon the Constitution (*United States* v. *Butler,* 297 U. S. 1), and the other rests upon the promise contained in Section 17 (a). The two rights are for wholly different amounts—the right based upon illegality of the tax is the right to recover no more than the amount of the burden of the tax which petitioners

bore (*Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337). The contract, on the other hand, entitled petitioners to the full amount of the processing taxes paid with respect to the exported products, for only by offer of a full repayment could Section 17 (a) parallel Section 17 (b), and only by that offer could Congress accomplish the purpose it wished to accomplish—the preservation of our export trade.[17]

This independent contract right the Government's argument now seeks to destroy by remitting petitioners to Title VII. Plainly enough, that Title preserves to petitioners their rights based upon payment of an illegal tax, and is possibly, but as yet not certainly, a proper regulation of the procedure by which that right is to be enforced. *Anniston Mfg. Co.* v. *Davis, supra.* At the same time, it is equally plain that Title VII does *not* preserve petitioners' contract rights. Section 911 categorically forbids the consideration of export refunds under Title VII. The processor-exporter can recover under Title VII *only* as *processor*—as one who has paid an illegal tax. As an *exporter*—as one who

[17] Moreover, the method and basis of computation is wholly different. The right to recover illegally exacted taxes, to the extent the burden was borne, is measured by the amount of tax paid *per hundredweight* of hogs at the time of processing. The contract right to the drawback is measured, as of the time of export, by the conversion factor for the particular product. See *infra*, p. 32, note 19. This conversion factor was established by the Secretary *in advance* of export. It was necessarily an arbitrary figure for each product, taking into account the relative values of the resulting products and wastage in processing the taxed commodity. The amount computed by applying the conversion factors at the time of export would be only roughly related—depending on the type of product yield, etc.—to the amount of illegally exacted tax on the live hog originally processed. In determining export prices ex-tax the conversion factors established by the Secretary were used.

has a contractual right against the United States, he is remediless.

The Government may urge that a similar destruction of rights has been sanctioned by this Court in *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, in which the Court held that Congress might forbid suit against the Collector of Internal Revenue for taxes collected under an unconstitutional statute if a fair and adequate remedy against the United States remained. In that case, however, the taxpayer had but a single right—to recover, under the Constitution, taxes which it had paid. Two remedies to enforce the single right were open at the time of payment—suit against the collector, or suit against the United States. The statute upheld in that case simply took away one of these remedies—the suit against the collector. As the Court stated (p. 343):

> The Government has not denied its obligation to refund the amounts found in the authorized proceeding to be recoverable, but has recognized that obligation. In such a case, the substitution of an exclusive remedy directly against the Government is not an invasion of constitutional right.

In the *Anniston* case, in other words, but *one right* was involved, and the question was solely one of remedies. The obligation of the Government was not denied or abrogated in any way. Here, on the contrary, *two rights* are involved. Under the Government's construction, one of them, a contract right against the United States, is annulled and avoided. The *Anniston* case does not sanction that result, and the *Lynch* case plainly condemns it.

Conceivably, the Government may also urge that no constitutional issue is presented by this construction of Section 601 (b) because the present case falls within the

exception stated in the *Lynch* case itself—that contracts may be annulled if the action is "within the federal police power or some other paramount power". 292 U. S. at p. 579. We do not question that the exception to the rule exists, but we deny that any paramount power can be urged to achieve the extremely inequitable and discriminatory consequences of annulling petitioners' contracts which we have already pointed out. See p. 15, *supra*.[18]

We submit, therefore, that Congress did not have the intent ascribed to it by the Government. All of the decisions recognize that the Government's position results

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[18] Compare the criticism made by the President in vetoing a bill by which, in similar fashion, one small group of taxpayers were singled out for the imposition upon them of a special burden. The President's veto message stated (H. Doc. No. 864, 76th Cong., 3d Sess.):

> The second proposal is that no duties collected prior to June 26, 1938, under paragraph 1115 (b) of the Tariff Act of 1930, shall be refunded, unless the claimant establishes that he bore the burden of such duties. No reason appears discernible why one small group of claims should be singled out for the imposition of such a requirement when no such condition is exacted from claimants for refund of duties erroneously paid under any other paragraph of the Tariff Act. . . .
>
> Since the effect of this proposal would be to introduce a palpable inequality of treatment as between claimants against the Government, I am impelled to disapprove the bill.
>
> FRANKLIN D. ROOSEVELT
>
> *The White House*, July 3, 1940.

Certainly no paramount necessities of national import support a discrimination. The Court should, if it is reasonably possible, avoid the construction of the statute urged by the Government which would have precisely the same result as that condemned by this veto message.

in the absurdity of granting a drawback in subsection (a) of Section 601 and taking it away in subsection (b) of the same section. All of the decisions recognize that the Government's position results in the serious and wholly irrational inequity of penalizing petitioners because they chose to rely on the promise contained in Section 17 (a) instead of utilizing a bond under Section 17 (b)—in fact, in penalizing petitioners because the statute was held unconstitutional, since had it been held valid, petitioners would unquestionably have been paid. All of the decisions recognize that the Government's position results in a remission of petitioners and like claimants to a procedure—Title VII—to which Congress said they were not to be remitted, and which is fundamentally inapplicable to the matter of export drawbacks. No reason has been shown why Congress should be assumed to have so completely and unreasonably shifted its position from that which it had adopted in Section 21 (d) in 1935. Finally, no doubt can exist but that if the Government's construction were to be adopted, a serious constitutional question would be raised. That question can be avoided by a construction which will avoid absurdity and inequity, and be consistent with the whole scheme of both the Agricultural Adjustment Act and the Revenue Act of 1936.

II

THE COURT BELOW ERRED IN DISMISSING THE ACTION ON THE GROUND THAT IT LACKED JURISDICTION

The court below agreed with petitioners that they were entitled to the export drawbacks which had been assured them by Section 17 (a), and that they were not to be remitted to Title VII of the Revenue Act of 1936. The grounds upon which the Government had resisted

the suit thereupon disappeared. Nevertheless, the court concluded that Section 601 (e), *infra*, p. 43, deprived it of jurisdiction to grant a refund, and required the dismissal of the bill. The point had not been raised in either the pleadings or the briefs, and no argument had been addressed to the court on the proper construction of the subsection. Had there been, we believe that the court would not have fallen into the error of construing the subsection as barring the present suit.

Although the basis of the judgment below is thus the jurisdictional issue, we have postponed it to this point for several reasons. The discussion in Point I demonstrates the complexity of the issue of statutory construction which is involved, yet it is necessary to have an understanding of that issue, and of the nature of the claim which petitioners assert, in order to determine the proper scope of Section 601 (e). Moreover, in the event that the Government be sustained in its contention under Point I that petitioners' only remedy is under Title VII, there will then be no necessity for this Court to pass upon the question now under consideration. However, if the Court is of opinion that petitioners are entitled to the export drawbacks which they claim, Section 601 (e) is no bar to their recovery.

Claims against the United States, even though they are contract claims, are of course subject to the rule that the sovereign may not be sued without its consent. *De Groot* v. *United States*, 5 Wall. 419, 432; *United States* v. *Babcock*, 250 U. S. 328, 331; *Lynch* v. *United States*, 292 U. S. 571, 581-582. Here, however, the consent to be sued has been given by Section 145 of the Judicial Code (U. S. C., Title 28, Sec. 250), which confers jurisdiction on the Court of Claims of actions against the United States for claims founded on con-

tracts express or implied. This general consent was plainly not affected by the Revenue Act of 1936. Compare *Lynch* v. *United States,* 292 U. S. 571, 583. The only question is whether Section 601 (e) is a specific provision which, even though the right of recovery exists, bars the remedy of suit to enforce it.

Section 601 (e) provides as follows:

> (e) The *determination* of the Commissioner of Internal Revenue *with respect to any refund* under this section shall be final and no court shall have jurisdiction to review *such determination.* (Italics supplied.)

We believe that this subsection means that such matters as findings of fact, computations, and the like, are committed to the final determination of the Commissioner, but that it does not mean that a court is without jurisdiction to decide whether or not the denial of a claim for refund is fraudulent, or whether or not a person is, as a matter of law—of construction of the statute—entitled to have the Commissioner determine whatever rights may be due to him under the section. Such a construction of the subsection is both reasonable and in accord with the obvious intent of Congress.

There is still a wide area in which the statute may operate. Determination of the amount of an export drawback, for example, is not a simple matter of mathematics, even though the conversion factors were fixed by the Act. Section 603. Products which are exported are entitled to export drawbacks under Section 17 (a) whether they are processed "wholly or partly" from a product upon which a processing tax has been paid. Intricate questions of fact must be determined in order to fix the amount of draw-

back due.[19] Similar problems, equally complex, are presented for the determination of the Commissioner in order to determine the proper amount to be refunded

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[19] For example, in the case of wheat products which had been exported, the Commissioner of Internal Revenue had, in the conversion factor, merely the percentage of the per bushel processing tax on wheat with respect to one hundred pounds of an article processed wholly or partly from that commodity. He was still faced with the necessity, in order to apply the correct conversion factor, to determine whether the product, for example, flour, was whole wheat or graham, was a farina, or (dependent upon ash content) was to be classified as bran. The conversion factors for these products alone ranged from 0.0 to 234.7 per cent of the tax. Similar variations requiring detailed factual determination occurred for prepared flour, cereal preparations, bread and other wheat products. Similar problems were presented in the case of cotton. Conversion factors for cotton products left open the determinations whether a particular product fell within one of over a hundred classifications (*e.g.*, flannelette toweling, Osnaburg, print cloth, sateen, tire fabric, velveteen, voile, etc.) and as to whether each classification was bleached or unbleached, colored or uncolored, mercerized or unmercerized, etc. Each of these variables made for a change in the applicable conversion factor and the amount of the export drawback.

The same problems, of course, are left for the decision of the Commissioner in connection with export drawbacks on hog products such as those involved here. The Commissioner has to ascertain the precise classification of the product among some thirty-six or more possible cuts of pork, and on the basis of whether the particular cut was fresh, frozen, in cure, barrelled dry, pickled, or smoked, or cooked in either dried or canned form. The conversion factors varied from 0.0 to as high as 292 per cent of the processing tax on hogs per pound of product, depending on that determination. For example, in the case of regular ham, if exported dry salted, the conversion factor would be 194 per cent; if pickled, 184 per cent; if smoked, 206 per cent; if cooked and dried, 242 per cent. Obviously the Commissioner's determination as to where any particular exported ham fell was properly made final.

under other sections reenacted by Section 601 (a), which deal with deliveries for charitable distribution, floor stocks tax adjustments made necessary by change of processing tax rates, and remission of taxes which unduly burden any commodity.[30] Indeed, the terms of Section 601 (d), *infra*, p. 42, which make the Commissioner's "findings of fact" and "mathematical calculation" binding on other government officers and employees indicate the Congressional appreciation of the complexities of the problems presented.

Absent such a provision as that contained in subsection (e), all of these questions would have been reviewable judicially, with the obvious likelihood that comprehensive and complex questions would have been presented in every case. Compare *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551, 560. That result Congress undoubtedly wished to avoid. It did so by making the determination of the Commissioner final "with respect to any refund under this section" both with respect to other governmental agencies (Section

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[30] *E.g.*, with respect to products delivered for charitable distribution or use, the determination required checking of the date of delivery, the name of the charitable organization, the specific distribution or use made of the product (refunds being controlled by such use and not merely by the character of the organization), the net weight of the product on the basis of its taxed and untaxed content, the month and year in which it had been processed, the applicable tax rate at such time, etc. See P. T. Form 24-C. The claims under Section 15(a) with respect to bags, required data as to sacking capacity in numerous poundage classifications, actual weight of bags, whether paper, jute or cotton, whether multiwall, coated, open-mesh, etc., and inventories at specific time intervals, whether, in the case of cotton bags, the fabric was calendered, or bleached, or colored, etc., and the sources of the cotton content (lint, card strips, comber waste, etc.) segregated by weight, etc. See P. T. Forms 24-A and 24-B.

601 (d)) and with respect to the courts (Section 601 (e)).

The subsection, thus interpreted, has a plainly defined and reasonable sphere of action. Moreover, there are several reasons for believing that Congress intended that to be its meaning.

1. The language employed in the subsection indicates that Congress was not removing from the jurisdiction of the courts the decision on whether a claim for refund of a particular character can be considered under Title IV or Title VII—a question which is wholly one of the interpretation of the statute. The Commissioner's insistence that petitioners, by the statute, were remitted to Title VII is not a "*determination with respect to any refund under this section*"; it is only a denial that petitioners' claim may even be considered.[21] That denial is not a determination with respect to a refund "under" the section at all. On the other hand, once the Commissioner accepts a claim for refund "under" the section, and proceeds to a determination of the merits of that claim, his determination of the amount due is not reviewable by the courts.[22]

2. Thus even considered by itself, the language of Section 601 (e) offers compelling evidence that Congress

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[21] The word "determination" itself would seem to imply a fact judgment on the merits of the claim, rather than a legal interpretation of the statute denying the right to make any claim at all.

[22] Even then, of course, Congress would not intend to exclude *all* judicial review. If the Commissioner's "determination" was tainted by fraud or other defect going to its *bona fides*, it would be subject to review on that ground by the courts. Compare *Dismuke* v. *United States*, 297 U. S. 167, 172; *Lloyd Sobaudo Societa* v. *Elting*, 287 U. S. 329, 339. Under such circumstances the "determination" would also not be "under" the section.

did not intend to deny jurisdiction to the courts in cases such as this. The evidence becomes practically conclusive, however, when one considers the marked contrast between the language of the subsection and provisions elsewhere in the same statute by which Congress unquestionably intended to deny any jurisdiction to the courts with respect to any aspect of certain claims for refund. For example, in Section 906 (a), *infra*, p. 45, (which is part of Title VII and thus inapplicable here, see pp. 17-29, *supra*), the Act states:

> (a) Notwithstanding any other provision of law, *no suit or proceeding, whether brought before or after the date of the enactment of this Act, shall be brought or maintained in any court* for the refund of any amount paid or collected as processing tax, as defined herein, under the Agricultural Adjustment Act, except as provided in this section. . . . (Italics supplied.)

Similar language is contained in Section 904. That language is clear: "no suit or proceeding . . . shall be brought." The language of Section 601 (e), on the other hand, simply imparts finality to the Commissioner's determination "with respect to any refund under this section". Certainly it is highly unlikely that Congress used the very different language of Section 601 (e) to accomplish the drastic result which the court below attributed to it, since had it intended *that* result, the language necessary to make that intention clear was ready to hand.

3. The construction of Section 601 (e) thus indicated by both the language of that section alone and by its striking dissimilarity to other sections of the same act, is further supported, if that be necessary, by a number of decisions in this Court. Each of them accords the

same construction to provisions similar to Section 601 (e) contained in other statutes. Indeed, that construction has become so well recognized that a strong presumption exists against the construction adopted here by the court below. The principle has been recently stated in *Dismuke* v. *United States,* 297 U. S. 167, 172:

> But the power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled.

In that case the statute authorized the Commissioner of Pensions to "adjudicate the claim" of the applicant, and also authorized an appeal to the Secretary of the Interior. In permitting judicial examination, nevertheless, the Court stated (pp. 172-173):

> This does not authorize denial of a claim if the undisputed facts establish its validity as a matter of law, or preclude the courts from ascertaining whether the conceded facts do so establish it.

The same construction has been afforded other provisions dealing with the administration of veterans' affairs. In *United States* v. *Williams,* 278 U. S. 255, the statute provided that "the decisions [of the appropriate officers] . . . shall be final and conclusive". (See 278 U. S. at 257.) The Court refused to review the determination of the Director as to the facts, but stated the rule to be that the Director's action (pp. 257-258)—

> . . . is final, at least unless it be wholly without evidential support *or wholly dependent upon a question of law* or clearly arbitrary or capricious. (Italics supplied.)

See also *Silberschein* v. *United States,* 266 U. S. 221, 225.

The same rule applies in cases arising under the public land laws. In *United States* v. *Laughlin*, 249 U. S. 440, the Secretary of the Interior was required to repay excessive payments under the land laws when "it shall appear to the satisfaction of the Secretary" (see 249 U. S. at p. 442) that excessive payment had been made. The Court denied that the provision allowed the Secretary to determine wholly legal questions (p. 443):

> In our view it was the intent of Congress that the Secretary should have exclusive jurisdiction only to determine disputed questions of fact, and that, as in other administrative matters, his decision upon questions of law should be reviewable by the courts. In the case before us the facts were not and are not in dispute, and were shown to the Secretary's satisfaction; whether, as matter of law, they made a case of excess payment . . . was a matter properly within the jurisdiction of the court of claims.

Medbury v. *United States*, 173 U. S. 492, 497-498 is to the same effect.[23] See also *McLean* v. *United States*, 226 U. S. 374; *United States* v. *MacVeagh*, 214 U. S. 124; *United States* v. *Hvoslef*, 237 U. S. 1; *Lloyd Sobaudo Societa* v. *Elting*, 287 U. S. 329; *United States* v. *Compagnie Générale Transatlantique*, 26 F. (2d) 195 (C. C. A. 2d, 1928).

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[23] In the *Medbury* case the statute required the Commissioner of the General Land Office to repay certain amounts paid for public lands when they were later found to be not within a railroad grant. The Court stated (pp. 497-498):

> If there were any disputed questions of fact before the Secretary, his decision in regard to those matters would probably be conclusive, and would not be reviewed in any court; but where, as in this case, there is no disputed question of fact, and the decision turns exclusively upon the proper construction of the act of Congress, the decision of the Secretary refusing to make the payment is not final, and the court of claims has jurisdiction of such a case.

4. The construction of Section 601 (e) adopted by the court below also runs contrary to the well-settled canon of statutory interpretation that only clear and unequivocal language will compel the conclusion that Congress has nullified existing rights by removing from the jurisdiction of the federal courts actions by which those rights might be enforced. *Becker Steel Co.* v. *Cummings,* 296 U. S. 74, 80; *Lynch* v. *United States,* 292 U. S. 571, 586.[24]

5. Finally, as constructed by the court below, Section 601 (e) is contrary to the whole policy of Congress in dealing with the questions arising out of the decision in *United States* v. *Butler,* 297 U. S. 1. In no other aspect of the claims arising out of the Agricultural Adjustment Act has Congress completely denied judicial recourse to a claimant whose claim is refused *solely* by reason of an erroneous administrative construction of the statute. In the most important class of cases—those involving claims for refund of illegally exacted processing taxes—Congress categorically excluded direct action for their recovery from the jurisdiction of the courts but at the same time provided an alternative method *with appropriate judicial review. Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337, 343. In the other large class of cases—claims for refund of floor stock taxes—the questions raised may be taken directly to the courts upon denial of the claim by the Commissioner. Section 905. In fact, the basic purpose of the whole Revenue

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[24] It is not without significance that if subsection (e) bars the recovery of the amount which is due petitioners under Section 17 (a), it will be the first time, to our knowledge, that Congress has ever denied judicial relief to one to whom a refund of taxes is admittedly due. The possible exception, *Cary* v. *Curtis,* 3 How. 234, was immediately corrected by statute. Act of February 26, 1845, c. 22, 5 Stat. 727.

Act of 1936, insofar as it dealt with the adjustment of Agricultural Adjustment Act claims, was not to deny claimants an appeal to the courts to recover that to which they were entitled. Rather the Act was designed to substitute new methods of preliminary administrative adjustment and new limitations upon the amounts recoverable, and to preserve in all cases adequate judicial review of the administrative process. It would be strange indeed to conclude that Congress, for no apparent reason, intended to depart from that basic purpose with respect to this one minor class of claims—the validity of which is wholly unrelated to the constitutionality of the Agricultural Adjustment Act.

We submit, therefore, that the construction accorded Section 601 (e) by the court below is erroneous. All the evidence, intrinsic and extrinsic, denies that Congress intended to leave petitioners, if they are, as we believe we have demonstrated in Point I, entitled to the export drawbacks, wholly without judicial recourse to correct a mistaken legal conclusion by the Commissioner as to the proper construction of the statute.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the court below should be reversed, and the cause remanded with instructions to overrule the motion to dismiss the complaint.

Respectfully submitted,

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October, 1940.

APPENDIX

PERTINENT PROVISIONS OF STATUTES

1. AGRICULTURAL ADJUSTMENT ACT OF MAY 12, 1933, C. 25, 48 STAT. 31, AS AMENDED, 48 STAT. 676, 49 STAT. 18, 770, 1739, 7 U. S. C. SEC. 617:

SEC. 17. (a) Upon the exportation to any foreign country (and/or to the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam) of any product processed wholly or partly from a commodity with respect to which product or commodity a tax has been paid or is payable under this title, the tax due and payable or due and paid shall be credited or refunded. Under regulations prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, the credit or refund shall be allowed to the consignor named in the bill of lading under which the product is exported or to the shipper or to the person liable for the tax provided the consignor waives any claim thereto in favor of such shipper or person liable for the tax. In the case of rice, a tax due under this title which has been paid by a tax-payment warrant shall be deemed for the purposes of this subsection to have been paid; and with respect to any refund authorized under this section, the amount scheduled by the Commissioner of Internal Revenue for refunding shall be paid, any provision of law notwithstanding. In the case of sugar beets and sugarcane, this subsection shall be applicable to exports of products thereof to the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and/or the island of Guam only if this title with respect to sugar beets and sugarcane is not made applicable thereto. The term "product" includes any product exported as merchandise, or as a container for merchandise, or otherwise.

(b) Upon the giving of bond satisfactory to the Secretary of the Treasury for the faithful observance of the provisions of this title requiring the payment of taxes, any person shall be entitled, without payment of the tax, to process for such exportation any commodity with respect to which a tax is imposed by this title, or to hold for such exportation any article processed wholly or partly therefrom.

* * * *

SEC. 21(d)(1). No recovery, recoupment, set-off, refund, or credit shall be made or allowed of, nor shall any counter claim be allowed for, any amount of any tax, penalty, or interest which accrued before, on, or after the date of the adoption of this amendment under this title (including any overpayment of such tax), unless, after a claim has been duly filed, it shall be established, in addition to all other facts required to be established, to the satisfaction of the Commissioner of Internal Revenue, and the Commissioner shall find and declare of record, after due notice by the Commissioner to such claimant and opportunity for hearing, that neither the claimant nor any person directly or indirectly under his control or having control over him, has, directly or indirectly, included such amount in the price of the article with respect to which it was imposed or of any article processed from the commodity with respect to which it was imposed, or passed on any part of such amount to the vendee or to any other person in any manner, or included any part of such amount in the charge or fee for processing, and that the price paid by the claimant or such person was not reduced by any part of such amount. In any judicial proceeding relating to such claim, a transcript of the hearing before the Commissioner shall be duly certified and filed as the record in the case and shall be so considered by the court. The provisions of this subsection shall not apply to any refund or credit authorized by subsection (a) or (c) of section 15, section 16, or section 17 of this title, or to any refund or credit to the processor of any tax paid by him with respect to the provisions of section 317 of the Tariff Act of 1930.

2. REVENUE ACT OF 1936 (JUNE 22, 1936), C. 690, 49 STAT. 1648:

Title IV—Export, Charitable, etc., Refunds and Floor Stocks Adjustment under Agricultural Adjustment Act.

SEC. 601. REFUNDS UNDER AGRICULTURAL ADJUSTMENT ACT ON EXPORTS, DELIVERIES FOR CHARITABLE DISTRIBUTION OR USE, ETC.

(a) The provisions of sections 10(d), 15(a), 15(c), 16(e)(1), 16 (e) (3), and 17 (a) of the Agricultural Adjustment Act, as amended, are hereby reenacted but only for the purpose of allowing refunds in accordance there-

with in cases where the delivery for charitable distribution or use, or the exportation, or the manufacture of large cotton bags, or the decrease in the rate of the processing tax (or its equivalent under section 16 (e) (3)), took place prior to January 6, 1936.

(b) Except for refunds under section 15 (a) of the Agricultural Adjustment Act, as reenacted herein, no refund under this section shall be made to the processor or other person who paid or was liable for the tax with respect to the articles on which the claim is based. No refund under this section shall be allowable to any person with respect to any articles where such person prior to January 6, 1936, paid an amount as tax under the Agricultural Adjustment Act, as amended, by taking as a credit against such amount an amount otherwise allowable as a refund with respect to such articles under sections 15 (a), 15 (c), 16 (e) (1), 16 (e) (3), or 17 (a) of said Act. No refund under this section shall be allowed to any person except to the extent that he establishes that he has not received, and is not entitled to receive, reimbursement of such amount from the processor or other vendor with respect to the articles on which the claim is based. No claim under this section (except claims of processors under section 15 (a)) shall be disallowed on the ground that the tax with respect to the article or the commodity from which processed has not been paid.

(c) No refund under this section shall be made unless the claimant files a claim therefor prior to January 1, 1937, under rules and regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, and no claim shall be allowed in an amount less than $10. Sections 16 (g) and 21 (f) of the Agricultural Adjustment Act, as amended, are repealed.

(d) In the absence of fraud, the findings of fact and the decision of the Commissioner of Internal Revenue upon the merits of any claim adjusted pursuant to this section and the mathematical calculation therein shall not be subject to review by any administrative or accounting officer, employee, or agent of the United States.

(e) The determination of the Commissioner of Internal Revenue with respect to any refund under this section shall be final and no court shall have jurisdiction to review such determination.

(f) No interest shall be allowed in connection with any refund made under this section.

(g) Section 16(c) (1) of the Agricultural Adjustment Act, as reenacted by subsection (a) of this section, is amended by striking out "subsequent to June 26, 1934" and by inserting in lieu thereof "on or after June 1, 1934."

* * * * *

Title VII—Refunds of Amounts Collected under the Agricultural Adjustment Act.

SEC. 901. REPEALS.

Sections 21 (d), 21 (e), and 21 (g) of the Agricultural Adjustment Act, as amended, are hereby repealed.

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.

No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or

(3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever.

SEC. 903. FILING OF CLAIMS.

No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require that claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes.

SEC. 904. STATUTE OF LIMITATIONS.

Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of enactment of this Act, shall be brought or maintained in any court for the recovery, recoupment, set-off, refund, or credit of, or counterclaim for, any amount paid by or collected from any person as tax (except processing tax, as defined herein) under the Agricultural Adjustment Act (a) before the expiration of eighteen months from the date of filing a claim therefor under this title, unless the Commissioner renders a decision thereon within that time, or (b) after the expiration of two years from the

date of mailing by registered mail by the Commissioner to the claimant a notice of disallowance of that part of the claim to which such suit or proceeding relates. Any consideration or any action by the Commissioner with respect to such claim following the mailing of notice of disallowance shall not operate to extend the period within which any suit or proceeding may be brought.

SEC. 905. JURISDICTION OF COURTS.

Concurrent with the Court of Claims, the District Courts of the United States (except as provided in section 906 of this title) shall have jurisdiction of cases to which this title applies, regardless of the amount in controversy, if such district courts would have had jurisdiction of such cases but for limitations under the Judicial Code, as amended, on jurisdiction of such courts based upon the amount in controversy. The United States Customs Court shall not have jurisdiction of any such cases.

SEC. 906. PROCEDURE ON CLAIMS FOR REFUNDS OF PROCESSING TAXES.

(a) Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of the enactment of this Act, shall be brought or maintained in any court for the refund of any amount paid or collected as processing tax, as defined herein, under the Agricultural Adjustment Act, except as provided in this section. The Commissioner shall allow or disallow, in whole or in part, any claim for refund of any such amount within three years after such claim was filed, unless such time has been extended by written consent of the claimant.

(b) There is hereby established in the Treasury Department a Board of Review (hereinafter referred to as "the Board"). The Board shall be composed of nine members who shall be officers or employees of the Treasury Department designated by the Secretary of the Treasury. One of such members shall be designated by the Secretary to act as chairman of the Board. The chairman may from time to time divide the Board into divisions of one or more members, assign the members of the Board thereto, and in case of a division of more

than one member designate the chief thereof. A majority of the members of the Board or of any division thereof shall constitute a quorum for the transaction of the business of the Board or of the division respectively. A vacancy in the Board or in any division thereof shall not impair the powers nor affect the duties of the Board or division nor of the remaining members of the Board or division respectively. The Secretary of the Treasury shall assign to the Board such personnel in the Treasury Department as may be necessary to perform its functions. The Board shall have jurisdiction in proceedings under this section to review the allowance or disallowance of the Commissioner of a claim for refund, and to determine the amount of refund due any claimant with respect to such claim. The Commissioner shall make refund of any such amount determined by a decision of the Board which has become final. The proceedings of the Board and its divisions shall be conducted in accordance with such rules and regulations as the Board may prescribe, with the approval of the Secretary.

(c) The allowance or disallowance of the Commissioner of a claim for refund under this section shall be final, unless within three months after the date of mailing by registered mail by the Commissioner of notice that a claim for refund of any such amount has been disallowed, in whole or in part, the claimant files a petition with the Board requesting a hearing on the merits of his claim, in whole or in part. Upon the filing of any such petition, the claimant shall be entitled to a hearing as provided herein, and within three months after the date of such filing the Board shall set a date for such hearing which shall be not more than two years from the date of filing of the petition. Such hearing shall be held in Washington, District of Columbia, or in the collection district in which is located the principal place of business of the claimant, as the claimant may designate in his petition, or in any place which may be designated by the Commissioner and the claimant by stipulation in writing, and may be continued from day to day. The Board shall notify the claimant and the Commissioner of the time and place set for such hearing by registered mail.

(d) Each such hearing shall be conducted by a presiding officer who shall be a member of the Board or an

officer or employee of the Treasury Department designated a presiding officer by the Secretary of the Treasury, and assigned by the Board to preside at such hearing, and shall be open to the public. The proceedings in such hearings shall be conducted in accordance with such rules of practice and procedure (other than rules of evidence) as the Board may prescribe with the approval of the Secretary of the Treasury, and in accordance with the rules of evidence applicable in courts of equity of the District of Columbia. The claimant and the Commissioner shall be entitled to be represented by counsel, to have witnesses subpenaed, and to examine and cross-examine witnesses. The presiding officer shall have authority to administer oaths, examine witnesses, rule on questions of procedure and the admissibility of evidence, and to require by subpena, signed by any member of the Board, the attendance and testimony of witnesses, and the production of all necessary returns, books, papers, records, correspondence, memoranda and other evidence, from any place in the United States at any designated place of hearing, and to require the taking of a deposition by any designated individual competent to administer oaths. Any witness summoned or whose deposition is taken pursuant to this section shall receive the same fees and mileage as witnesses in the courts of the United States.

(e) The presiding officers shall recommend findings of fact and a decision to the Board or the proper division thereof within six months after the conclusion of the hearing. Briefs with respect to such recommendations may be submitted to the Board or such division on behalf of the Commissioner and the claimant within thirty days after such recommendations have been made, unless such time is extended by the Board or such division. Except upon specific order of the chairman of the Board, no oral argument may be presented to the Board or such division after the conclusion of the hearing. The Board or a division shall make its findings of fact and decision in writing as quickly as practicable. The findings of fact and the decision of a division shall become the findings of fact and decision of the Board within thirty days after they have been made by the division, unless within such period, the chairman has directed that such findings

and decision shall be reviewed by the Board. The findings and decision of a division shall not be a part of the record in any case in which the chairman directs that such findings and decision shall be reviewed by the Board. Copies of the findings of fact and decision of the Board shall be mailed to the claimant and the Commissioner by registered mail.

(f) The Board, with the approval of the Secretary of the Treasury, is authorized to draw up a table of costs and fees relating to such hearings, and the preparation of transcripts of record thereof, not to exceed with respect to any one item those charged in the Supreme Court of the United States. Such costs and fees shall be paid by the claimant and be collected in accordance with such rules and regulations as may be prescribed by the Board, with the approval of the Secretary. If the hearing provided herein results in a modification of the allowance or disallowance of the Commissioner, such costs shall be returned to the claimant.

(g) A review of the decision of the Board, made after the hearing provided in this section, may be obtained by the claimant or Commissioner by filing a petition for review in the Circuit Court of Appeals of the United States within any circuit wherein such claimant resides, or has its principal place of business, or, if none, in the United States Court of Appeals for the District of Columbia, or any such court which may be designated by the Commissioner and the claimant by stipulation in writing within three months after the date of the mailing to the claimant and the Commissioner of the copy of the findings and decision of the Board. A copy of such petition shall forthwith be served upon the Commissioner or upon any officer designated by him for that purpose, or upon the claimant, according to which party files such petition, and upon the Board. Thereupon the Board shall certify and file in the court, in which such petition has been filed, a transcript of the record upon which the findings and decision complained of were based. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm the decision of the Board, or to modify or reverse such decision, if it is not in accordance with law, with or without remanding the

cause for a rehearing, as justice may require. No objection shall be considered by the court unless such objection shall have been urged before the Board or division and the presiding officer, or unless there were reasonable grounds for failure so to do. If the claimant or the Commissioner shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material, and that there were reasonable grounds for failure to adduce such evidence in the hearing before the presiding officer, the court may order such additional evidence to be taken before such officer, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Board may modify its findings of fact and decision by reason of the additional evidence so taken and it shall file with the court such modified or new findings and decision. The judgment of the court shall be final, subject to review by the Supreme Court of the United States, upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code, as amended. Such courts are authorized to adopt rules for the filing of petitions for review, the preparation of the record for review, and the conduct of the proceedings on review. If the decision of the Board is affirmed, costs shall be awarded against the claimant, and if such decision is reversed, the judgment shall provide for a refund of any costs paid by the claimant. In case of modification of such decision costs shall be awarded or refused as justice may require. The decision of the Board made after the hearing provided herein shall become final in the same manner that decisions of the Board of Tax Appeals become final under section 1005 of the Revenue Act of 1926, as amended.

SEC. 907. EVIDENCE AND PRESUMPTIONS.

(a) Where the refund claimed is for an amount paid or collected as processing tax, as defined herein, it shall be prima-facie evidence that the burden of such amount was borne by the claimant to the extent (not to exceed the amount of the tax) that the average margin per unit of the commodity processed was lower during the tax period than the average margin was during the period before and after the tax. If the average margin during

the tax period was not lower, it shall be prima-facie evidence that none of the burden of such amount was borne by the claimant but that it was shifted to others.

(b) The average margin for the tax period and the average margin for the period before and after the tax shall each be determined as follows:

(1) TAX PERIOD.—The average margin for the tax period shall be the average of the margins for all months (or portions of months) within the tax period. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month and deduct the processing tax paid with respect thereto. The sum so ascertained shall be divided by the total number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(2) PERIOD BEFORE AND AFTER THE TAX.—The average margin for the period before and after the tax shall be the average of the margins for all months (or portions of months) within the period before and after the tax. The margin for each such month shall be computed as follows: From the gross sales value of all articles processed by the claimant from the commodity during such month, deduct the cost of the commodity processed during the month. The sum so ascertained shall be divided by the number of units of the commodity processed during such month, and the resulting figure shall be the margin for the month.

(3) AVERAGE MARGIN.—The average margin for each period shall be ascertained in the same manner as monthly margins under subdivisions (1) and (2), using total gross sales value, total cost of commodity processed, total processing tax paid, and total units of commodity processed, during such period.

(4) COMBINATION OF COMMODITIES.—Where, as, for example, in the case of certain types of tobacco,

the articles produced and sold by the claimant are the product of several commodities combined by him during processing, the average margins shall be established with respect to such commodities as a group, and not individually, in accordance with rules and regulations prescribed by the Commissioner, with the approval of the Secretary of the Treasury.

(5) COST OF COMMODITY.—The cost of commodity processed during each month shall be (a) the actual cost of the commodity processed if the accounting procedure of the claimant is based thereon, or (b) the product computed by multiplying the quantity of the commodity processed by the current prices at the time of processing for commodities of like quality and grade in the markets where the claimant customarily makes his purchases.

(6) GROSS SALES VALUE OF ARTICLES.—The gross sales value of articles shall mean (a) the total of the quantity of each article derived from the commodity processed by the claimant during each month multiplied by (b) the claimant's sale prices current at the time of processing for articles of similar grade and quality.

(7) The quantity of each article derived from the commodity processed may be either (a) the actual quantity obtained, as shown by the records of the claimant, or (b) an estimated quantity computed by multiplying the quantity of commodity processed by appropriate conversion factors giving the quantity of articles customarily obtained from the processing of each unit of the commodity.

(c) The "tax period" shall mean the period with respect to which the claimant actually paid the processing tax to a collector of internal revenue and shall end on the date with respect to which the last payment was made. The "period before and after the tax" shall mean the twenty-four months (except that in the case of tobacco it shall be the twelve months) immediately preceding the effective date of the processing tax, and the six months, February to July, 1936, inclusive. If during any part of such period the claimant was not in business, or if his

records for any part of such period are so inadequate as not to provide satisfactory data on prices paid for commodities purchased or prices received for articles sold, the average prices paid or received by representative concerns engaged in a similar business and similarly circumstanced may with the approval of the Commissioner, where necessary for a fair comparison, be substituted in making the necessary computations. If the claimant was not in business during the entire period before and after the tax, the average margin, during such period, of representative concerns engaged in a similar business and similarly circumstanced, as determined by the Commissioner, shall be used as his average margin for such period.

(d) If the claimant made any purchase or sale otherwise than through an arm's-length transaction, and at a price other than the fair market price, the Commissioner may determine the purchase or sale price to be that for which such purchases or sales were at that time made in the ordinary course of trade.

(e) Either the claimant or the Commissioner may rebut the presumption established by subsection (a) of this section by proof of the actual extent to which the claimant shifted to others the burden of the processing tax. Such proof may include, but shall not be limited to—

(1) Proof that the difference or lack of difference between the average margin for the tax period and the average margin for the period before and after the tax was due to changes in factors other than the tax. Such factors shall include any clearly shown change (A) in the type or grade of article or commodity, or (B) in costs of production. If the claimant asserts that the burden of the tax was borne by him and the burden of any other increased costs was shifted to others, the Commissioner shall determine, from the effective dates of the imposition or termination of the tax and the effective date of other changes in costs as compared with the date of the changes in margin (when margins are computed for weeks, months, or other intervals between July 1, 1931, and August, 1936, in the manner specified in subsection (b)), and from the general experience of

the industry, whether the tax or the increase in other costs was shifted to others. If the Commissioner determines that the difference in average margin was due in part to the tax and in part to the increase in other costs, he shall apportion the change in margin between them;

(2) Proof that the claimant modified existing contracts of sale, or adopted a new form of contract of sale, to reflect the initiation, termination, or change in amount of the processing tax, or at any such time changed the sale price of the article (including the effect of a change in size, package, discount terms, or any other merchandising practice) by substantially the amount of the tax or change therein, or at any time billed the tax as a separate item to any vendee, or indicated by any writing that the sale price included the amount of the tax, or contracted to refund any part of the sale price in the event of recovery of the tax or decision of its invalidity; but the claimant may establish that such acts were caused by factors other than the processing tax, or that they do not represent his practice at other times. If the claimant processed any product in addition to the commodity with respect to the processing of which there was paid or collected an amount as tax for which he claims a refund, and if the Commissioner has reason to believe that the burden of such amount was shifted in whole or in part by means of the transactions relating to such product, the average margin with respect to such product, and articles processed therefrom, shall also be considered, and shall be determined for the tax period applicable to the commodity and for the period before and after the tax in the manner prescribed in subsection (b) of this section. To the extent the Commissioner determines that the average margin with respect to such product was higher during the tax period than it was during the period before and after the tax, it shall be prima-facie evidence that such amount was not borne by the claimant but that it was shifted to others.

SEC. 908. LIMITATIONS ON ALLOWANCE OF CLAIMS AND INTEREST.

(a) No claim shall be allowed under this title in an amount less than $10.

(b) No interest shall be allowed by the Commissioner or by any court with respect to any amount paid or collected as tax under the Agricultural Adjustment Act, except with respect to amounts, refund of which is made or allowed under this title.

SEC. 909. LIMITATIONS ON REVIEW.

In the absence of fraud or mistake in mathematical calculation, the findings of fact and conclusions of law of the Commissioner upon the merits of any claim presented under this title shall not be subject to review by any other administrative or accounting officer, employee, or agent of the United States.

SEC. 910. LIABILITY OF COLLECTORS.

No collector of internal revenue or customs, or internal revenue or customs officer or employee, shall be in any way liable to any person for any act done by him in the assessment or collection of any amount as tax under the Agricultural Adjustment Act, or for the recovery of any money exacted by or paid to him and paid into the Treasury, in performance of his official duties under the provisions of such Act, or if such collector or officer acted under the direction of the Secretary or other proper officer of the Government.

SEC. 911. INAPPLICABILITY TO CERTAIN REFUNDS.

The provisions of this title shall not apply to any refund authorized under the provisions of sections 15, 16, or 17 of the Agricultural Adjustment Act, as amended and reenacted, or with respect to any articles exported under the provisions of section 317 of the Tariff Act of 1930. No refund shall be made or allowed of any amount paid or collected as tax under the Agricultural Adjustment Act, as amended and reenacted, to the extent that refund or credit with respect to such amount has been made to any person.

* * * *

SEC. 913. DEFINITIONS.

When used in this title—

(a) The term "tax" means a tax or exaction denominated a "tax" under the Agricultural Adjustment Act, and shall include any penalty, addition to tax, additional tax, or interest applicable to such tax.

(b) The term "processing tax" means any tax or exaction denominated a "processing tax" under the Agricultural Adjustment Act, but shall not include any amount paid or collected as tax with respect to the processing of a commodity for a customer for a charge or fee.

(c) The term "commodity" means any commodity, prior to processing, of a type with respect to the processing of which a processing tax was imposed under the Agricultural Adjustment Act.

(d) The term "article" means the product which is obtained by processing a commodity, and includes the product obtained by further manufacture or by combination with other materials.

(e) The term "refund" includes any recovery, recoupment, set-off, credit, or counterclaim.

(f) The term "Agricultural Adjustment Act" means the Agricultural Adjustment Act as originally enacted and the amendments thereto adopted prior to January 6, 1936.

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LEGISLATIVE HISTORY

1. REPORT OF THE HOUSE COMMITTEE ON WAYS AND MEANS, H. REP. NO. 2475, 74TH CONG., 2D SESS., PP. 13-14.

Title IV. Refunds Under Agricultural Adjustment Act and Floor Stocks Adjustment.

It is the purpose of section 601 of this title to reenact into law certain sections of the Agricultural Adjustment Act, as amended, providing for refunds in certain cases. Section 601(a) reenacts these sections for the sole pur-

pose of allowing refunds in accordance therewith in cases where the delivery for charitable distribution or use, or the exportation, or the manufacture of large cotton bags, or the decrease in the rate of the processing tax (or its equivalent under section 16(e)(3)), occurred prior to January 6, 1936. The enactment of this section will serve to remove doubts as to the legal authority of the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, which have existed since the decision of the United States Supreme Court holding the Agricultural Adjustment Act invalid, to continue the making of refunds under the provisions of sections 10(d), 15(a), 15(c), 16(e)(1), 16(e)(3), and 17(a) of that act, as amended.

Section 10(d), is merely a general provision authorizing the Secretary of the Treasury to make necessary regulations to carry out the powers vested in him by the title of the Agricultural Adjustment Act.

Section 15(a) provides for the suspension by the Secretary of Agriculture and the refunding or crediting of the processing or compensating tax upon such amount of a commodity as the Secretary of Agriculture should by proclamation find is used in the manufacture of any class of products of such commodity which is of such low value, considering the quantity of the commodity used for their manufacture, that the imposition of the processing tax would prevent in whole or large part the use of the commodity in such manufacture, thereby substantially reducing consumption and increasing the surplus of the commodity.

Section 15(c) provides for the refunding or crediting to persons delivering any product to any organization for charitable distribution, or use, including any State or Federal welfare organization, for its own use, of any tax due or paid under the Agricultural Adjustment Act, with respect to the product so delivered, subject to certain prescribed conditions.

Section 16(e)(1) makes provisions for refunds or credits on floor stocks when the rate of the tax on the processing of any commodity generally or for any designated use or uses, or as to any designated product or products thereof for any designated use or uses, is decreased in the manner provided by the act. Section

16(e)(3) makes section 16(e)(1) applicable when the tax is suspended under section 15(a).

Section 17(a) makes provision for the refunding or crediting of processing taxes due and paid or due and payable on products processed wholly or partly from a commodity with respect to which product or commodity a tax has been paid or is payable, upon the exportation of such product or commodity to any foreign country or to the Philippine Islands, Virgin Islands, American Samoa, the Canal Zone, or the Island of Guam.

Section 601(b) excludes from the benefits of the section the processor or other person who paid the tax with respect to the articles on which the claim is based, for the reason that the claims of such persons are within the provisions of section 21(d) of the Agricultural Adjustment Act, as amended.

* * * *

Section 601(d) is similar to the provisions of existing law relating to internal-revenue taxes which limit administrative review of the findings of fact and the decision of the Commissioner of Internal Revenue upon the merits of claims adjusted pursuant to this section to cases of fraud or mistake in mathematical calculation.

Section 601(e) makes the determination of the Commissioner of Internal Revenue with respect to any refund under this section final and not subject to judicial review, and section 601(f) disallows any claim for interest with respect to claims for refund made under this section. It is the opinion of your committee that, while provision for the relief of claimants in the cases covered by this section should be made, the fact that the refunds will be made to persons other than those who paid or were liable for the payment of the tax under the Agricultural Adjustment Act, as amended, and the present doubt as to the legal status of these claims warrants the disallowance of interest and the withdrawal of any right to judicial review of the determinations of the Commissioner.

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2. REPORT OF THE SENATE FINANCE COMMITTEE, SEN. REP. NO. 2156, 74TH CONG., 2D SESS.:

(pp. 27-28)

Title IV. Export, Charitable, etc., Refunds and Floor Stocks Adjustment under Agricultural Adjustment Act.

SECTION 601. REFUNDS ON EXPORTS, DELIVERIES FOR CHARITABLE DISTRIBUTION OR USE, ETC.

Your committee is in general agreement with the purposes of this title of the House bill, but proposes certain clarifying textual amendments and minor changes in substance, and several other amendments which it is believed will tend to simplify the administration of the title.

Section 601 of the House bill would reenact into law certain sections of the Agricultural Adjustment Act, as amended, viz., sections 10(d), 15(a), 15(c), 16(e)(3), and 17(a), for the sole purpose of allowing refunds in accordance therewith in cases where delivery for charitable distribution or use, or exportation, or the manufacture of large cotton bags, or a decrease in the rate of the processing tax (or its equivalent under Sec. 16(e)(3)), occurred prior to January 6, 1936. The enactment of this section will serve to remove serious doubts as to the legal authority of the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, which have existed since the decision of the United States Supreme Court holding the Agricultural Adjustment Act invalid, to continue the making of such refunds.

Your Committee recommends that section 601(a) of the House bill be amended by striking out the parenthetical clause beginning in the third line of the subsection. The purpose of this provision, it is believed, will be better subserved by the proposed amendment adding a new section, 603, to the title, which is discussed hereinafter.

Your Committee is of the opinion that the House bill should be amended by striking out section 601(d) and substituting a new subsection. This provision of the House bill would deny the benefits of the section to any processor or other person who paid the processing tax with respect to the articles on which a claim is based. The amendment recomended by your Committee would make an exception to this limitation in the case of refunds under section 15(a) of the Agricultural Adjustment Act,

as reenacted herein, to remove an inadvertent discrimination against a limited number of manufacturers of large cotton bags who are also processors of cotton yarn and to correct what would otherwise be an unfortunate competitive situation.

The claims for refund of other processors are adequately provided for by Title VII which your committee recommends be added as an amendment to the House bill. The second and third sentences of the proposed subsection (b) are intended to safeguard the interests of the revenue by denying refunds in cases in which credit against tax has previously been taken and allowed and cases in which the claimant does not establish that he has not received and is not entitled to receive reimbursement of the burden of the tax from the processor or other vendor. The last sentence of the subsection would operate to relieve claimants under section 601 (except processors claiming under Sec. 15(a) of the Agricultural Adjustment Act as reenacted therein) of the burden of proving payment of a processing tax with respect to the articles or commodities on which such claims are based. This change will accommodate section 601 to the provisions of section 602(e) relating to refunds to holders of floor stocks on January 6, 1936. It is believed the same rule should apply to both classes of claims and that the rule proposed will simplify and expedite their administrative disposition. The rule is not and should not be applied to claims of processors under section 15(a), since the validity of such claims necessarily depends upon tax having been paid.

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(p. 32)

Title VII. Refunds of Amounts Collected under the Agricultural Adjustment Act.

GENERAL STATEMENT

Your committee recommends the adoption of this title, as an amendment to the House bill, as necessary to the protection of the revenue and to the practical administration of a large and extremely difficult class of refund cases.

This title will introduce certain necessary provisions into the internal-revenue laws relating to a particular

class of refunds. The provisions of the title relate to the making of refunds of amounts which have been collected under the Agricultural Adjustment Act. It is of the utmost importance that the provisions of section 21 (d) of the Agricultural Adjustment Act, which now deals with that subject, be revised, both from an administrative standpoint and to remove certain legal objections that have been urged with respect to that section.

NECESSITY FOR TITLE VII.

Title VII consists entirely of a revision of the provisions of section 21 (d) of the Agricultural Adjustment Act and related provisions. That section now provides that no recovery or refund shall be made or allowed of any amounts paid or collected under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner of Internal Revenue that he has borne the economic burden of the tax for which refund or recovery is sought. The Commissioner of Internal Revenue is required to give a hearing to each claimant and to find and declare of record whether or not the claimant has absorbed the burden of the tax. A transcript of such hearing must be made for use as a record in the case, if a court review of the Commissioner's action is desired.

(pp. 36-37)

Section 911 is designed to prevent two refunds with respect to the same amount collected under the Agricultural Adjustment Act. Section 911 also provides that the provisions of this title do not apply to export, charitable, and certain other refund claims, the adjustment of which is authorized by sections 15, 16, and 17 of the Agricultural Adjustment Act and section 601 of H. R. 12395. It is necessary to provide specifically that this title does not apply to such claims so that there will be no confusion between the provisions of this title and section 601 of H. R. 12395. It is not the intent of this section, however, to limit the rights of processors who have paid processing taxes on articles or commodities which they have themselves subsequently exported or delivered for charitable distribution or use to obtain refunds of such processing taxes subject to the requirements of this title, since processors are, with one minor exception, not entitled to the benefits of Section 601 of Title IV.